No. 14,856

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM RICHARDS, CLANCY HENKINS, JOSEPH L. RIEDI, ROBERT S. SCHY and LOIS LANE,

Appellants,

vs.

JUNEAU INDEPENDENT SCHOOL DISTRICT and DOUGLAS INDEPENDENT SCHOOL DISTRICT, to be known as JUNEAU-DOUGLAS INDEPENDENT SCHOOL DISTRICT,

Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLANTS.

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William Richards, Clancy Henkins, Joseph L. Riedi, Robert S. Schy and Lois Lane,

Appellants,

vs.

Juneau Independent School District and Douglas Independent School District, to be known as Juneau-Douglas Independent School District,

Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLANTS.

JURISDICTION.

This is an appeal from a Judgment of the District Court made and entered on March 18, 1955, establishing Juneau-Douglas Independent School District under the provisions of Chapter 93, SLA 1953 (P.R. 31-35). On March 28, 1955, appellants Robert S. Schy

and Lois Lane filed a Petition in the District Court on their own behalf and on behalf of the 290 petitioners similarly situated who signed the petition attached to their Petition and Motion, for leave to appear by Motion and for an order to alter and amend the Judgment and Order of the District Court and for a new trial and hearing (P.R. 36-42). On March 28, 1955, appellants William Richards, Clancy Henkins, and Joseph L. Riedi filed a petition, on their own behalf and on behalf of the 222 petitioners similarly situated who signed the petition previously filed in the District Court with the letter of John H. Dimond, attorney for the City of Douglas, Alaska (P.R. 26-28), in the District Court for leave to appear by Motion and for an order to alter and amend the Judgment and Order of the District Court and for a new trial and hearing (P.R. 42-48). The Petition and Motion of each set of appellants were argued together on April 22, 1955. The District Court made and entered its order denying both Petitions (P.R. 49) on May 21, 1955. An appeal was taken by each set of appellants from the District Court's final order and Judgment of April 22, 1955, by filing with the District Court a Notice of Appeal (P.R. 50-51).

The jurisdiction of the District Court is granted by 48 U.S.C.A. 101.

The jurisdiction of this Honorable Court is granted by Title 28 U.S.C.A. Judiciary and Judicial Procedure, Section 1291.

The Procedure of the Appeal is governed by 48 U.S.C.A. 103a, extending the Federal Rules of Civil

Procedure on July 18, 1949, to the District Courts of Alaska.

The appeal of appellants Robert S. Schy and Lois Lane was consolidated with the appeal of appellants William Richards, Clancy Henkins and Joseph L. Riedi by the order of this Honorable Court made and entered herein on August 17, 1955 (P.R. 70-71).

STATEMENT OF CASE.

The Juneau Independent School District was organized under the provisions of Section 37-3-41 ACLA 1949 and embraces approximately 202 square miles and includes the municipal corporation of Juneau, Alaska, within its boundaries (P.R. 3-4). The Douglas Independent School District was organized under the provisions of Section 37-3-41 ACLA 1949 and embraces approximately 95.2 square miles and includes the municipal corporation of Douglas, Alaska, within its boundaries (P.R. 4-5).

On March 28, 1953, the Legislature of the Territory of Alaska, enacted Chapter 93, SLA 1953, into Law. The pertinent parts of Chapter 93, SLA 1953, read as follows:

> "Section 1. Whenever any two independent or incorporated school districts or any independent and incorporated school district, have any contiguous boundary they may be consolidated in the manner hereinafter provided, and when so consolidated shall become a single school district subject to all the laws and ordinances of the larger in population of the school districts so

consolidated based on the number of people who voted within such district at the last general election. The boundaries of any independent or incorporated school district shall be considered as contiguous for the purpose of this Act unless said boundaries are completely separated by land. Independent or incorporated school districts, the boundaries of which are separated only by a river, stream, slough, channel, inlet, bay or other narrow body of water, shall be considered as contiguous.

"Section 2. The area to be included in such consolidated independent or incorporated school districts shall not embrace more than 1,000 square miles of territory.

"Section 3. (a) Separate petitions from each of the independent or incorporated school districts desiring to be consolidated shall first be presented to the Judge of the United States District Court of the Judicial Division in which the independent or incorporated school districts are located. Each petition must be signed by as many voters as would equal 25% of the number of people who voted in the respective independent or incorporated school districts at the last general election and such petitions shall specify, as nearly as may be possible, the location, boundaries and areas of each of the independent or incorporated school districts to be consolidated, and shall specify the proposed name of the consolidated independent or incorporated school districts. Such petitions shall further certify the combined area of the independent or incorporated school districts desiring to be consolidated, and must certify that said area does not exceed the maximum number of square miles authorized by this Act.

"(b) The Judge of the District Court, upon presentation and filing of such petitions, shall order an election in each of said independent or incorporated school districts for the purpose of determining whether the people desire such consolidation and shall by said order fix the date for the election, the place and hours of voting, and appoint three qualified voters in the proposed consolidated school district to supervise and appoint election officers for such election. A printed or typewritten copy of said order shall be posted in at least three public places within the limits of each of the independent or incorporated school districts requesting consolidation for at least thirty (30) days prior to the day of election, and such posting shall be sufficient notice of such election.

"Section 4. The qualified electors of the communities proposed to be consolidated shall also, at said election by a separate ballot, choose a board of five (5) directors for the consolidated school district who must be qualified electors of the consolidated school district and whose term of office shall be as hereinafter provided.

"Section 5. The judges of election shall also canvass the votes given at said election for members of the Board of Directors, and shall declare the five candidates who have received the largest number of votes for such office duly elected and shall issue and deliver to them certificates of their election, provided that the majority of votes cast in each of such districts have voted for consolidation.

"Section 6. The qualifications of electors at said election shall be the same as are required by Sec. 37-3-44 ACLA 1949.

"Section 7. The oath of election judges, the canvassing and compiling of the votes cast and the certification of the results of said election in each of said independent or incorporated school districts, shall be the same as is required by Sec. 37-3-45 ACLA 1949.

"Section 8. If a majority of the votes cast at said election in each of the independent or incorporated school districts desiring consolidation are in favor of consolidation, the District Judge shall, by order in writing entered in the record of the proceedings, adjudge and declare that said independent or incorporated school districts are consolidated and that the enlarged area (describing its boundaries) shall thenceforth constitute one school district, and specify its name. Thereafter the consolidated district shall function as to all its parts as a school district in conformity with applicable laws of Alaska and pursuant to its own ordinances, providing that the ordinances of the larger of the independent or incorporated school districts, according to the number of registered voters in the last general election held therein, so consolidated shall be in effect upon the order consolidating the districts. All assets of each of the independent or incorporated school districts shall become the property of the consolidated district, and all liabilities of each of such independent or incorporated school districts shall become the liabilities of the consolidated district.

"Section 13. Except as otherwise provided herein, the statutes applying to Independent School Districts shall apply to Consolidated School Districts established hereunder."

That on January 21, 1955, appellee filed a petition in the District Court praying that an order of election be held and conducted in the manner specified and in accordance with Ch. 93, SLA 1953, and that the Juneau Independent School District and the Douglas Independent School District be consolidated to constitute one School District to be known as Juneau-Douglas Independent School District in accordance with the provisions of Ch. 93, SLA 1953 (P.R. 3-13).

That thereafter and on January 21, 1955, the District Court made and entered its order directing that an election be held in each of said two separate school districts to determine whether the people desired such consolidation of the two school districts and provided the time, place and method for said elections and appointed election judges (P.R. 14-17).

That thereafter and on February 3, 1955, the election judges appointed by the District Court passed a resolution to the effect that an election be held in the two separate school districts on the following proposal, namely:

"Proposal"

> "Shall the Juneau Independent School District and the Douglas Independent School District be consolidated under the name of Juneau-Douglas Independent School District, in which event the ordinances of the Juneau Independent School District, being the larger of said school districts according to the number of registered voters at the last general election held therein, shall be in effect in such consolidated school district, including the ordinance providing for a 1% tax on re-

tail sales and services, which tax shall automatically become effective in that portion of the Douglas Independent School District located beyond the corporate limits of the City of Douglas, Alaska, upon entry of an order by the District Court consolidating said school districts. In the event of the approval of this proposal by a majority of the voters of each of said school districts, the order consolidating said school districts shall be contingent on the Common Council of the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax.

"Each ballot shall set forth the above proposition preceded by the instructions:

'Vote for or against the following proposal by placing an "X" in the appropriate box,' and followed by the words:

For Consolidation ☐
Against Consolidation ☐"

and that an election also be held on a separate form of ballot for the election of the members of the Board of Directors of the Consolidated School District and provided the qualifications of voters, for registration, and established the voting precincts (P.R. 18-21).

The Judges of Election took their oath on January 31, 1955 (P.R. 22), and on March 10, 1955, filed their certificate of election (P.R. 23-25).

The Record reveals that John H. Dimond, attorney for the City of Douglas, Alaska, wrote a letter to District Judge George W. Folta on behalf of the City

Council on March 15, 1955, advising him that 222 residents and taxpayers of the City have petitioned the City Council not to amend its tax ordinance (P.R. 26-27).

On March 18, 1955, the District Court entered its order consolidating the Juneau Independent School District and Douglas Independent School District to be known as Juneau-Douglas Independent School District (P.R. 31-35), but the City of Douglas, Alaska, was not a party to any of the proceedings in this case and said order consolidating said two school districts was not made contingent upon the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenue would be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax, nor did said order require the Common Council of the City of Douglas to so amend its said ordinance (P.R. 31-35).

Following this and on March 28, 1955, two appellants as permanent residents and inhabitants, qualified electors and taxpayers within the boundaries of Douglas Independent School District, either within or without the municipality of Douglas, Alaska, filed their petition for leave to appear by Motion and Order and for a new trial and hearing (P.R. 36-42). A petition signed by 290 residents and taxpayers of the Douglas Independent School District was attached to one Petition (P.R. 42). That on the same day three appellants as permanent residents and inhabitants, qualified electors, property owners and taxpayers of

the Municipal Corporation of Douglas, Alaska, filed their petition for leave to appear on their own behalf and on behalf of all other permanent residents and inhabitants who are qualified electors, property owners and taxpayers within the municipality of Douglas, Alaska, who were parties to the petition previously filed in the District Court in this case with the letter of John H. Dimond, attorney for the City of Douglas, Alaska (P.R. 26-28). Both of these petitions were consolidated by the order of this Court dated August 17, 1955, for the purpose of trial (P.R. 70-71).

Appellants' petitions were that the Order, Judgment and Decree of Consolidation dated March 18, 1955 (P.R. 31-35), consolidating the two school districts be vacated and set aside, or altered or amended, or that a new trial be granted and movants authorized to appear and defend on their own behalf and on behalf of all other persons similarly situated for the following reasons:

1. That the Notice of Election and ballots used at the election contained a provision that "The order consolidating said school districts shall be contingent on the Common Council of the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District Sales and Services Tax" (P.R. 37; P.R. 43-44).

2. That the Common Council of the City of Douglas has not amended its 2% retail Sales and Service Tax ordinance as provided in the Notice of Election

and Official Ballot used at the election, but on the contrary voted on March 18, 1955, in opposition to amending its said sales tax ordinance (P.R. 38; P.R. 44).

3. That there are only six members of the Common Council of the Municipality of Douglas, Alaska, and if there is a tie in any vote the Mayor of the Municipality has the right to cast the deciding vote. That three members of the Common Council and the Mayor are movants herein and have refused to vote and will not vote to amend said 2% sales and service tax ordinance, and that the Douglas retail sales and service tax cannot be amended as required by the order of election and official ballot used at the election on the question of consolidation (P.R. 38; P.R. 45).

4. That it would be illegal for the Common Council of the City of Douglas to amend its 2% retail sales and service tax ordinance without a vote of the residents within the municipal corporation of Douglas, Alaska, because of the prohibitions contained in Chapter 38, Session Laws of Alaska 1949, reading as follows:

> "It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with the consent of the voters at another referendum."

and because of the prohibitions contained in Chapter 121, Session Laws of Alaska, 1953, containing the same exact words (P.R. 39; P.R. 45-46).

5. That there is no legal ordinance in effect in the Municipal Corporation of Juneau, Alaska, or in the Juneau Independent School District, legally providing for a 1% tax on sales and services. There is an ordinance that purports to levy a sales tax on retail sales and services, and also an ordinance that purports to amend the City of Juneau Sales Tax Ordinance No. 338 to include a sales tax on "Rents", but neither said Ordinance No. 338 nor Ordinance No. 369 of the City of Juneau, Alaska, are legal or of any binding effect on the residents of Juneau, Alaska, or Juneau Independent School District (P.R. 39-40; P.R. 46-47).

6. That a majority of the residents and inhabitants of the Municipal Corporation of Douglas, Alaska, voted against consolidation of the Juneau Independent School District and Douglas Independent School District, and a majority of the residents of Douglas, Alaska, are opposed to being required to contribute retail sales, service and rental taxes collected wholly within the limits of the municipality of Douglas, Alaska, towards the construction of school buildings or for any other purpose outside of the limits of the corporate boundaries of said municipality (P.R. 40; P.R. 46-47).

7. That many of the petitioners who signed the petition attached to the petition of appellants Robert S. Schy and Lois Lane voted "For Consolidation" because they were persuaded to do so by misstatements and misrepresentations made by various school officials (P.R. 40-41).

8. That Chapter 93, Session Laws of Alaska 1953, under which the election for consolidation was held and under which the District Court's order of consolidation of March 18, 1955, was entered (P.R. 31-35) attempts to deprive the residents of the Municipal Corporation of Douglas, Alaska, of the right to govern themselves by permitting residents outside of the municipal boundaries of the municipality to vote that the ordinances of Juneau Independent School District will govern within the boundaries of the Townsite and Municipality of Douglas, Alaska (P.R. 47).

9. That Chapter 93, Session Laws of Alaska 1953, is unconstitutional in that it attempts to deprive movants (appellants) and all other residents of Douglas, Alaska, and the Municipal Corporation of Douglas, Alaska, of their property without due process of law (P.R. 47).

10. That Chapter 93, Session Laws of Alaska 1953, is also unconstitutional in that the residents and inhabitants of Douglas, Alaska, will be governed by the ordinances of Juneau Independent School District, and the inhabitants of Douglas, Alaska, would be deprived of the exclusive right to govern themselves (P.R. 47-48).

Thereafter the two petitions of appellants came on for argument on April 22, 1955, and thereafter and on April 23, 1955, the District Court entered a minute order denying the two petitions of appellants (P.R. 49).

APPEAL.

The Court's Judgment and Order Establishing Juneau-Douglas Independent School District (P.R. 31-35) was signed by the District Judge on March 18, 1955, and filed on March 22, 1955 (P.R. 35).

The Court's Order denying the Petition and Motion of appellants for a new trial was entered April 23, 1955 (Minute Order P.R. 49).

Notices of Appeal dated May 20, 1955, were filed by all appellants on May 21, 1955 (P.R. 50-51).

Cost Bonds were made by all appellants and filed on May 21, 1955 (P.R. 52-57).

Order extending time until August 15, 1955, within which to docket record on appeal was entered June 21, 1955 (P.R. 59-60).

QUESTIONS INVOLVED.

1. Whether an election can be held except pursuant to a statute or constitution, and if an election is held pursuant to a statute whether said statute must be followed.

2. Whether there is any statutory authority contained in Chapter 93, SLA 1953, authorizing an election on a proposition as to whether or not voters are or are not in favor of a consolidation of the two School Districts contingent upon the municipal corporation of Douglas, Alaska, amending its tax ordinance as contained in the proposal and on the ballot in the case at bar (P.R. 17-23-24).

3. Whether or not the ballots at an election authorized by statute must conform to the statute and the order of the District Court authorizing the election.

4. Whether or not the District Court was in error in making an order of consolidation of the two School Districts when the ballot at the election did not comply with any statutory law or with the order of the Court authorizing said election.

SPECIFICATIONS OF ERROR.

1. Under the laws of the Territory of Alaska authorizing the consolidating of two or more independent or incorporated school districts (Chapter 93, Session Laws of Alaska 1953) a printed or typewritten copy of the Order of the Judge of the District Court must be posted in at least three public places for at least thirty days prior to the day of election as required by said law, and the Trial Court erred in not requiring that the proposal set forth on the election ballot used in said school district election conform to the printed or typewritten copy of the Court's order for the election and the provisions of Chapter 93, Session Laws of Alaska 1953 (P.R. 65).

2. The Trial Court erred in making and entering its Order of March 18, 1955, based upon ballots that did not conform to the Laws of the Territory of Alaska and the District Court Order of election entered herein on January 21, 1955 (P.R. 66).

3. That the combined proposal and ballot used at the election of March 8, 1955, was contrary to law and to the Order of the District Court dated January 21, 1955, ordering the election on the proposed consolidated school district, and there was no law in the Territory of Alaska authorizing such combined proposal and ballot or such a ballot as was used at the election of March 8, 1955 (P.R. 66).

4. The Trial Court erred in making and entering its Order of March 18, 1955, establishing Juneau-Douglas Independent School District contrary to any provision of law in existence in the Territory of Alaska, and particularly contrary to the expressed provisions of Chapter 93, Session Laws of Alaska 1953, in view of the fact that the ballot was not for consolidation or against consolidation of the two school districts but was a ballot contingent upon the common council of the City of Douglas, Alaska, amending its 2% sales and service tax ordinance (P.R. 66).

5. The Trial Court erred in refusing to grant the petition of Appellants William Richards, Clancy Henkins, and Joseph L. Riedi and in refusing to alter and amend the Order of Consolidation—establishing Juneau-Douglas Independent School District—and in refusing to grant them a new trial and hearing (P.R. 66).

6. The Court erred in not granting William Richards, Clancy Henkins, and Joseph L. Riedi and other inhabitants, qualified electors and taxpayers, a fair

and impartial trial or hearing and in not according them due process of law or a fair opportunity to present their evidence in opposition to the consolidation of Juneau Independent School District and Douglas Independent School District to be known as Juneau-Douglas Independent School District (P.R. 67).

7. The Trial Court erred in refusing to alter and amend its Judgment and Order entered herein on March 18, 1955, establishing the Juneau-Douglas Independent School District (P.R. 67).

8. The Trial Court erred in entering its Minute Order of April 23, 1955, denying Appellants' Petition for leave to appear and for an Order to alter and amend the Judgment and Order of said Court entered on March 18, 1955, and denying the Petition of Appellants for a new trial and hearing (P.R. 67).

ARGUMENT.

In 1953 Chapter 93, SLA 1953, became the law of the Territory of Alaska and provided that two independent school districts could be consolidated under certain conditions and if certain steps were taken and after an election was held to determine whether or not a majority of the residents of both school districts to be consolidated were "For Consolidation". The law provided that the ballot to be submitted must give the electorate a right to vote "For Consolidation" or "Against Consolidation". There is no provision in the law for any other type of ballot.

In the order of the District Court calling for an election (P.R. 14) it was provided that an election be held . . . "for the purpose of determining whether the people desire such consolidation". However, such proposal or question was not submitted to the people in the two school districts. The proposal submitted to the people as shown by the resolution of the election judges (P.R. 17-18-19) and the certificate of election (P.R. 23-24) was:

> "Shall the Juneau Independent School District and the Douglas Independent School District be consolidated under the name of Juneau-Douglas Independent School District, in which event the ordinances of the Juneau Independent School District, being the larger of said school districts according to the number of registered voters at the last general election held therein, shall be in effect in such consolidated school district, including the ordinances providing for a 1% tax on retail sales and services, which tax shall automatically become effective in that portion of the Douglas Independent School District located beyond the corporate limits of the City of Douglas, Alaska, upon entry of an order by the District Court consolidating said school districts. In the event of the approval of this proposal by a majority of the voters of each of said school districts, the order consolidating said school districts shall be contingent on the Common Council of the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax.

"Each ballot shall set forth the above proposition preceded by the instructions:

"Vote for or against the following proposal by placing an 'X' in the appropriate box" and followed by the words:

For Consolidation ☐
Against Consolidation ☐."

The question as to whether or not the people in the two school districts were "For Consolidation" or "Against Consolidation" was not submitted to the people as required by Chapter 93, SLA 1953, or by the District Court's order for election (P.R. 14). The question upon which the people did express an opinion or desire, assuming for a moment that the results of the election can be said to show anything at all, is thus expressed upon the ballot.

"In the event of a majority vote by voters of each of said two school districts 'For Consolidation' of said two school districts, said consolidation shall be contingent on the common council of the City of Douglas amending its 2% retail sales and services tax ordinance so that one-half of the revenue thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and service tax."

There is absolutely no legal authorization for framing the ballot around a contingency. The only proposal authorized to be submitted by Chapter 93, SLA 1953, is the question as to whether the voters want or do not want the two school districts consolidated. The ballot obviously did not submit such question at all.

NO ELECTION IS VALID UNLESS EXPRESSLY AUTHORIZED BY STATUTE.

Our system of elections was unknown to the common law. The entire subject is governed by statutory law.

Taylor v. Beckham, 178 U.S. 548, 577.

No valid election can be held except pursuant to a statute or constitution. There is no reserved power in the people to hold an election, and there is no such inherent power vested in the Courts.

School District No. 1 v. Gleason, 168 P. (Ore.) 347;

State v. Kozer, 239 P. (Ore.) 805;

Thompson v. James, 250 N.W. (Neb.) 237.

And the Courts cannot exercise the legislative function.

Territory v. Stewart, 23 P. (Wash.) 405.

TWO SEPARATE PROPOSITIONS CANNOT BE COMBINED INTO ONE AND SUBMITTED TO THE VOTER AS A SINGLE PROPOSITION.

Since there can be no valid election but in pursuance of statutory authority, it follows that where a statute does authorize an election said statute must be strictly followed. Where the statute authorizes an election on one and only one proposition, such as is involved in this case, the election is invalid if another proposition be submitted to the voters, for then it would be the same as if there were no statutory authority at all. See: *Thompson v. James,* 250 N.W. (Neb.)

237; *McElroy v. State,* 47 S.W. (Tex. Crim. App.) 359; *Hallum v. Coleman,* 85 S.W. 2d (Tex. Civ. App.) 989; *Smith v. Morton Independent School District,* 85 S.W. 2d (Tex. Civ. App.) 853.

The ballots involved in the case at bar submitted to the voters two questions (1) whether the Juneau and Douglas Independent School Districts should be consolidated, and (2) whether the consolidation should be contingent upon the common council of the City of Douglas, Alaska, amending its sales and service tax. The questions were submitted in one single proposition. The voter could not say whether he desired the consolidation, or if he was against consolidation, or if he was for consolidation only if the Douglas sales tax ordinance was amended, or if he was against consolidation whether Douglas amended its sales tax ordinance or not, or whether he was for consolidation whether Douglas amended its sales tax ordinance or not. The ballot and election was unfair to the voters, and it was contrary to the laws of Alaska to so put the proposition on the ballot. This is because the voter, in order to get what he earnestly wants or thinks best for his community is compelled to vote for things he does not want. See: *State v. Maitland,* 246 S.W. (Mo.) 267; 29 *C.J.S.* 246, Section 170; 4 *A.L.R.* 623.

A BALLOT MUST GIVE THE VOTER AN OPPORTUNITY TO EXPRESS HIMSELF CLEARLY FOR OR AGAINST A PROPOSITION SUBMITTED, OR THE ELECTION IS VOID.

In the election in the case at bar the voters were not permitted to vote yes or no on the proposition as to whether they were "For Consolidation" or "Against Consolidation" of the two school districts, because the proposition was framed upon the contingency of the amendment of the City of Douglas sales and service tax ordinance. Moreover, the voter could not vote that he was "Against Consolidation" for such a vote could mean either that he was against the consolidation measure, or, that he was against consolidation being contingent upon the City of Douglas amending its sales and services tax ordinance. See: 29 *C.J.S.* 251, Section 173; *People ex rel. Duncan v. Worley,* 103 N.E. (Ill.) 579.

There was no substantial compliance or attempted compliance with the election procedure prescribed by Chapter 93, SLA 1953, as far as the notice of election or the ballot used at the election are concerned and therefore the election should be invalidated and the order of consolidation of the Juneau Independent School District and Douglas Independent School District set aside.

29 *C.J.S.* 246, Section 170;
78 *C.J.S.* 782, Section 57;
29 *C.J.S.* 251, Section 173;
State v. Maitland, 246 S.W. (Mo.) 267;
People ex rel. Duncan v. Worley, 103 N.E. (Ill.) 579.

In 1949 Chapter 38, Session Laws of Alaska 1949, became law in the Territory of Alaska and was the first law of the Territory authorizing a municipality to levy and collect a consumer's sales and services tax in the Territory. The pertinent part of said law reads as follows:

> "(b) CONSUMER'S SALES TAX. To levy and collect a consumer's sales tax not exceeding two percentum of the sales price on all retail sales and services made within the municipality; provided, that the consent of the qualified voters of the municipality is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot. If fifty-five percent (55%) or more of the votes cast in said referendum are in the affirmative, the council may thereafter enact such a tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the municipality. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and that although such method of taxation be established within a city, the council may at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose

unless with consent of the voters at another referendum."

Thereafter and in 1951 Chapter 47, Session Laws of Alaska, 1951, became law in the Territory of Alaska and subsection (b) of Chapter 38, Session Laws of Alaska 1949, was thereby repealed.

Thereafter and in 1953 Chapter 121, Session Laws of Alaska 1953, became law in the Territory of Alaska authorizing a municipality to levy and collect a consumer's sales, rents and services tax in the Territory. The pertinent part of said law reads as follows:

"(b) CONSUMER'S SALES TAX. To levy and collect a consumer's sales tax not exceeding two percentum of the sales price on all retail sales, rents and services, made within the municipality; provided, that the consent of the qualified voters of the municipality is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot. If a majority of the votes cast in said referendum are in the affirmative, the council may thereafter enact such a tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the municipality. No such sales tax proposition shall be

presented to the voters more than once in any twelve months. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and that although such method of taxation be established within a city, the council may, at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum.

"Section 2. All sales taxes heretofore levied and collected by municipalities within the Territory of Alaska, pursuant to ordinances which were valid at the time of their enactment, are hereby ratified and confirmed.

"Section 3. An emergency is hereby declared to exist, and this Act shall be in full force and effect immediately upon its passage and approval."

This Honorable Court will observe that there was no law in effect in the Territory of Alaska on April 4, 1952, when the common council of the City of Douglas, Alaska, enacted its Sales and Services Tax Ordinance No. 34 (see: Stipulation and Resolution No. 201 added to the transcript of record printed herein). Since there was no law in effect in Alaska on April 4, 1952, granting the municipal corporation of Douglas, Alaska, authority to enact a sales and services tax said ordinance was and is null and void.

Valentine v. Robertson et al., Circuit Court of Appeals, Ninth Circuit, 300 F. 521, 5 Alaska Federal 230.

And, therefore, the notice of election herein and the ballot used at said election (P.R. 18) and the certificate of election (P.R. 23) provided that the two school districts would be consolidated "on the contingency that the common council of the City of Douglas amend its retail sales and services tax ordinance" that in fact was void and was not a valid ordinance of said City. And the District Court was in error in entering its order of March 18, 1955, consolidating said two school districts (P.R. 31).

Moreover, Chapter 38, Session Laws of Alaska 1949 which was repealed by Chapter 47, Session Laws of Alaska 1951, provided:

> "It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum."

And, when Chapter 121, Session Laws of Alaska 1953, was enacted and again authorized a municipality to levy and collect a sales, rents and services tax it also contained this same provision, namely:

> "It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum."

We submit that this clearly shows the intent of the legislature and that the common council of the City of Douglas, Alaska, could not legally amend its illegal sales tax ordinance (at least not without consent of

the voters within the municipality) at another referendum. And, no consent of the voters at another referendum has ever been obtained.

For the reasons above given Resolution No. 201 (attached to the Printed Record) resolving to amend an invalid ordinance at some future date should not have been considered by the Trial Court for any purpose whatever.

There is nothing in the record to indicate whether the District Court considered Resolution No. 201 or not, but it is a fundamental principle of law that a municipal council can rescind its promises and resolutions, the same as any other legislative body and petitioners should have been granted a new trial by the District Court in order to adduce existing evidence in proof of the fact that the municipal council of Douglas, Alaska, had not only rescinded its Resolution No. 201 adopted January 10, 1955, at a regular meeting on March 15, 1955, but in fact voted by a majority vote not to amend its sales tax ordinance.

Even though the certificate of election (P.R. 23-24) shows that a majority of the voters voted "Yes" on the official ballot at the consolidation election the District Court erred in entering its Order and Judgment of Consolidation establishing Juneau-Douglas Independent School District (P.R. 31-35) since all votes on all ballots were cast on a contingent basis. They voted on the proposal as stated in the resolution (P.R. 17-19) that "In the event of the approval of this proposal by a majority of the voters of each of said school districts, the order consolidating said school

districts shall be contingent on the common council of the City of Douglas amending its 2% retail sales and services tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax." The common council of the City of Douglas has never at any time amended its sales and service tax ordinance in any respect and the contingency set forth in the ballot submitted to the voters in the Juneau and the Douglas Independent School Districts has never been met and said order of consolidation should not have been made and entered until said contingency was met and said Douglas sales and service tax ordinance amended as required by the ballot.

For the reasons stated it is respectfully submitted that the Order of the District Court of March 18, 1955, establishing Juneau-Douglas Independent School District (P.R. 31-35) be vacated and set aside.

Dated, Juneau, Alaska,
January 6, 1956.

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